No. 01-1302 FEB 11 2002

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In The

Supreme Court of the United States

Harvey William Harper, *Petitioner*,

-vs-

The State of California, *Respondent*.

On Petition For Writ of Certiorari To the
Court of Appeal, Fourth District
Division Two, State of California

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT

California Penal Code Section 4852 provides a procedure for obtaining a judicially determined Certificate of Rehabilitation that restores various civil, political and employment rights to ex-prisoners. Effective January 01, 1999, this statute was amended to exclude certain offenders from eligibility to obtain the judicial relief, and relegates this class of ex-prisoners to the politics of a gubernatorial pardon. In 1986, Petitioner was convicted of felony crimes that are within the ambit of the amendment. March 25, 1999, after completing the statutory required waiting period in effect both at the time of his conviction and parole, Petitioner filed a Section 4852 Penal Code application for a Certificate of Rehabilitation which was denied on the basis of post conviction amended statutory ineligibility.

QUESTIONS PRESENTED

1. Whether a post conviction and post parole statutory increase in the duration of civil and political disabilities, and employment disqualification, to which ex-prisoners are subject, constitutes punishment for ex post facto purposes?

2. Whether a statute retroactively imposing any degree of punishment is an ex post facto law, even if rationally related to a legitimate government purpose?

3. Whether equal protection of law is violated by a statute targeting only one class of ex-prisoners, terminating their eligibility for a Certificate of Rehabilitation

PARTIES TO THE PROCEEDING

Harvey William Harper, Petitioner, is an individual and has no corporate affiliations.

People of the State of California, Respondent.

OPINIONS BELOW

The opinion of the Court of Appeal, Fourth District, Division Two, State of California, Case No. E025062, Certified For Publication, but not published, (Appendix A) was filed April 28, 2000.

The unpublished opinion of the Court of Appeal, Fourth District, Division Two, State of California, Case No. E025062, Modifying Opinion and Decertifying it for Publication, with No Change in Judgment (Appendix B) was Filed May 10, 2000.

The opinion of the California Supreme Court, En Banc, Case No. S088651, summarily dismissed review (Appendix C) was filed November 14, 2001.

STATEMENT OF JURISDICTION

The jurisdiction of the Court in invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article 1, Section 9 of the United States Constitution, which states, in pertinent part:

"No Bill of Attainder or ex post facto law shall be passed."

This case also involves Amendment XIV of the United States Constitution, which states, in pertinent part:

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

This case involves California Penal Code Section 4852.01 which was amended effective January 01, 1998 (Appendix D) to exclude certain ex-prisoners from eligibility to petition for judicial relief from statutory civil, political disabilities and employment disqualifications that attend a felony conviction; as well as mandatory police registration and public notification of the ex-prisoner's commitment offense.

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STATEMENT OF THE CASE

In 1943 the California Legislature enacted Penal Code Section 4852, et seq[1], establishing a procedure to terminate post conviction penalties attending felony convictions of persons released from prison. It eliminates certain civil penalties, political disabilities and employment disqualifications, and ameliorates others by judicial review resulting in the grant of a Certificate of Rehabilitation, which also serves as a judicial recommendation for pardon. Whether or not the governor acts upon the court's recommendation, a Certificate of Rehabilitation terminates or ameliorates significant civil penalties, political disabilities and employment disqualifications, and thereby has a direct effect on punishment of ex-prisoners.

Effective January 01, 1998, §4852.01[2] was amended to exclude certain sex offenders from eligibility to obtain the judicial relief, and relegates this class of ex-prisoners entirely to the politics of a gubernatorial pardon.

In 1986, Petitioner was convicted of sex offenses that are within the ambit of the amendment. In 1994, Petitioner was released from prison on parole, and was fully discharged in 1997. March 25, 1999, after completing the 5 year waiting period required by the statute in effect both at the time of his conviction and parole, Petitioner filed a §4852.01 application for a Certificate of Rehabilitation which was denied, not on the merits, but solely on the basis of post conviction, post parole amended statutory ineligibility.

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[1] All statutory references are to the California Penal Code, unless otherwise indicated.

[2] See Appendix D for text of statute

I. RETROSPECTIVE APPLICATION OF §4852.01 TO PETITIONER, INCREASING THE DURATION OF CIVIL PENALTIES, POLITICAL DISABILITIES AND EMPLOYMENT DISQUALIFICATIONS TO WHICH EX-PRISONERS ARE SUBJECT, VIOLATES EX POST FACTO PROHIBITIONS.

Petitioner contends retrospective application of the 1998 amendment to his 1986 conviction extends the duration of and prolongs his punishment in violation of ex post facto principles of the United States Constitution.[3]

The new statute is a substantive change that denies an identifiable class, a discrete and insular minority of ex-prisoners the opportunity to obtain restoration of civil and political rights denied or impaired by felony conviction. As such, the enactment comes within the rule of Collins v Youngblood[4] which extends ex post facto protection to statutes which retroactively increase punishment.

Thus the ex post facto issue of whether a statute retroactively imposing any degree of punishment violates ex post facto prohibitions, even if rationally related to a legitimate government purpose comes down to two interrelated questions:

(1) Whether statutory civil penalties, political disabilities and employment disqualifications attending felony convictions are punishment?

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[3] "No Bill of Attainder or ex post facto Law shall be passed." Art. I, §9, cl 3; United States Constitution

[4] Collins v Youngblood (1990) 497 U.S. 157, 111 L.Ed.2d 30, 110 S.Ct. 2715

(2) Whether a statute retroactively imposing any degree of punishment is an impermissible ex post facto law, even if it is rationally related to a legitimate government purpose?

A. PUNISHMENT IS MORE THAN DEATH, PRISON OR FINES

Punishment is more than death, imprisonment or fines. Punishment is broader and includes exclusion from employment and other benefits. Punishments include "imprisonment, banishment, and the punitive confiscation of property by the sovereign . . . [and] a legislative enactment barring designated individuals or groups from participation in specified employment or vocations, a mode of punishment commonly employed against those legislatively branded as disloyal." Nixon v Administrator of General Services (1977) 433 U.S. 425, 474, 53 L.Ed.2d 867, 97 S.Ct. 2777.

An equally feared and hated minority – communists – were disqualified from employment as officers in labor unions under §504 of the Labor-Management Reporting and Disclosure Act of 1959 which was found to be punishment and declared invalid as a Bill of Attainder. U. S. v Brown (1965) 381 U.S. 437, 445, 14 L.Ed.2d 484, 85 S.Ct. 1707.

Petitioner's felony conviction subjects him to a number of statutory disabilities and impairments that involve disqualification in vocational and professional employment, as well as in the exercise of certain civil and political rights. Retrospective application of the recently amended §4852.01 punishes Petitioner in 3 ways: (1) It prolongs the duration of the statutory disabilities in civil and political rights as well as in employment disqualification; (2) It prolongs the burdensome punishment of mandatory police registration; and (3) It stigmatizes Petitioner through public notification.

As a consequence of his felony conviction for violation of §288, Petitioner is subject to both mandatory sex offender registration and public notification.[5] Public disclosure of the name, address of the convicted sex offender, photograph, personal and vehicle description, and nature of offense, arouses public fear, hatred and community rejection; the latter-day Scarlet Letter.

Six years after Nixon, a California Court of Appeal acknowledged that punishment was more than imprisonment, which represents society's initial phase of retribution against a convicted criminal.

> "In 1976 the California Legislature forthrightly declared that 'the purpose of imprisonment for crime is punishment. [§1170, subd.. (a)(1).] The time has come to recognize with equal candor that 'imprisonment' represents only the first phase of society's retribution against the convicted criminal. 'Punishment' in a variety of forms besets the parolee, the probationer and ex-felon long after the completion of his prison term. As one writer has observed: 'Ours is a penalty system of justice. Ex-prisoners continue to suffer from statutory and extra-legal penalties long after their release from prison' Note, the *Revolving Door: The Effect of Discrimination Against Ex-Prisoners* (1975) 26 Hastings L. J. 1403, 1432" Sovereign v People (1983) 144 Cal.App.3d 143, 148. 192 Cal.Rptr. 469. (emphasis added)

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[5] §290(m) provides police discretion for public notification. §290.4 requires compilation of sex offender registration information that is disseminated to the public. The information regarding convicted child molesters "shall include the names and known aliases of the person, photograph, a physical description, gender, race, date of birth, the criminal history, and the address, including ZIP Code, in which the person resides. See Appendix for text of statute.

B. DISQUALIFICATION AND EXCLUSION FROM EMPLOYMENT, CIVIL AND POLITICAL DISABILITIES ARE PUNISHMENT

The Sovereign court recognized that upon release from custody, the ex prisoner cannot simply resume his previous life as if nothing had happened. The court noted that in addition to well known extra legal penalties – stigma[6] – following felony conviction, "he or she confronts a battery of statutory disabilities" of which a partial list includes:

> "the ex-felon may not serve on petit or grand juries (Code Civ. Proc., § 199), not be employed as a peace officer for the state, city or county (Gov. Code, § 1029), not sit for the state civil service examination (Gov. Code §18935), not possess a concealable weapon (§ 12021 Penal Code) and, in some cases, not hold public office (Cal. Const., art VII, §8) ".
> Ibid. 144 Cal.App.2d 143, 148

The court noted various additional statutory penalties that apply to ex-felons.

> " The ex-felon may be impeached as a witness or as a defendant on the basis of his prior conviction, and his prior conviction may be used as sentence enhancement in any criminal proceeding (Evid. Code § 788, Cal Const. Art. I, § 28). Also, he must register with local police authorities if his offense was related to certain drug and sex crimes (Penal Code § 290; Health & Safety Code § 11590)."

> "Finally, the ex-felon is precluded from obtaining a

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[6] "BRANDED MAN" ® MERLE HAGGARD, country ballad 1994 Tree Productions, Inc.

> license to practice and is subject to discharge from a host of trades and professions. Their number is too numerous to list here, but ranges from barber (Bus. & Prof. Code § 6576) and seeing-eye dog trainer (Bus. & Prof. Code § 7211.9) to chiropractor (§ 10 Chiropractic Act [Deerings Ann. Bus. & Prof. Code . . .] and lawyer (Bus. & Prof. Code, § 6101)."
> Sovereign v People, supra 144 Cal.App.3rd 143, 148-149

These disabilities, impairments, sanctions and disqualifications are punishment. Relief was available to Petitioner from these punishments until retroactively revoked by amended §4852.01.

C. PROLONGING DURATION OF CIVIL & POLITICAL DISABILITIES INCREASES PUNISHMENT

Sovereign involved an ex post facto issue directly analogous to this case. The question was whether the post conviction amendment to §4852.01 retroactively increasing the required waiting period after release from prison to apply for a Certificate of Rehabilitation increased punishment by prolonging the time an ex-prisoner was subject to the statutory civil and political disabilities attending his felony conviction. The court in Sovereign held: (1) statutory civil and political disabilities following felony conviction are punishment; (2) prolonging the required waiting period to apply for a Certificate of Rehabilitation increased the punishment; and concluded (3) retrospective application of the post conviction amended statute prolonging petitioner's punishment is a "violation of the constitutional prohibition against ex post facto laws." Sovereign, supra 144 Cal.App.3d 143, at page 154.

This was not a novel interpretation or unique application of ex post facto principles. Precedent had been set. In an earlier employment analogous case, the California Supreme

Court ruled that a statute revoking a convicted sex offender's teaching credential was punishment, and that retrospective application of the credential revoking statute was an impermissible ex post facto law. DiGenova v State Board of Education (1962) 57 Cal.2d 167, 18 Cal.Rptr. 369, 367 P.2d 865.

The California court in Ansell upheld §4852.01 against ex post facto challenge reasoning that "because a certificate of rehabilitation has no direct or indirect ameliorative effect on the 'punishment' for a crime, as that word is defined for ex post facto purposes . . . (the amendment) does not increase such punishment in violation of the ex post facto clause." See People v Ansell (2001) 25 Cal.4th 868, 872,108 Cal.Rptr.2d 145, 24 P.3d 1174.

This conclusion is incorrect; it begs the question and is contrary to various specific statutory provisions that directly terminate or ameliorate penalties and disabilities attending felony convictions upon the granting of a Certificate of Rehabilitation, without the necessity of a pardon.

Relief from various vocational and professional employment disqualifications under the Business and Professions Code is a clear example:

> "(b) Notwithstanding any other provision of this code, no person shall be denied a license solely on the basis that he has been convicted of a felony if he has obtained a certificate of rehabilitation under Section 4852.01 and following of the Penal Code . . ." (emphasis added) Section 480 Bus. & Prof. Code -

Similar relief in an employment license penalty terminating statute is found in the Labor Code:

"Notwithstanding any other provision of this code, no

person who has not previously obtained a license regulated by this code shall be denied a license solely on the basis that he has been convicted of a crime if he has obtained a certificate of rehabilitation under Section 4852.01 and following of the Penal Code . . ."
Section 26 Labor Code (emphasis added)

Obtaining a Certificate of Rehabilitation has an ameliorative effect upon teachers convicted of a crime:

"(b) Notwithstanding any other provision of this code, no person shall be denied a hearing solely on the basis that he has been convicted of a crime if he has obtained a certificate of rehabilitation under Section 4852.01 and following of the Penal Code . . ." (emphasis added)
Sections 44008(b) & 87008(b) Education Code

The credibility of a witness may not be attacked on the basis of a felony conviction where "a certificate of rehabilitation and pardon has been granted to the witness under the provisions of Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code. " §788(b) Evidence Code. (emphasis added)

Under statutes in effect at the time of Petitioner's conviction, sex offender registration information was confidential, not available to the public, but available for inspection only by law enforcement officers.[7] Now Petitioner is subject to public notification of his sex offender conviction.[8]

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[7] "§290(i) Confidential records. The statements, photographs, and fingerprints herein required shall not be open to inspection by the public or by any person other than a regularly employed peace or other law enforcement officer." (Added by Stats. 1985, chap 1474, § 2; Amended by Stats. 1986, c. 1299, § 7)

[8] §290(m) and §290.4. See Appendix for text

Even more significantly, at the time of Petitioner's conviction the ex-prisoner sex offender's duty to register was relieved upon his obtaining a Certificate of Rehabilitation:

> "A person required to register under Section 290 may initiate a proceeding under Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of this code, and upon obtaining a certificate of rehabilitation, shall be relieved of any further duty to register under Section 290. . ." (emphasis added)
> Section 290.5 Penal Code

Based upon the foregoing, it is apparent that ex-prisoners, as a consequence of their felony conviction, suffer statutory penalties, civil and political disabilities, disqualification and exclusion from employment after their release from imprisonment, which amount to punishment for their crime. A Certificate of Rehabilitation terminates some of these penalties and disabilities, and ameliorates others; regardless of whether the Governor acts upon the judicial recommendation for a pardon. And the political reality is that the Governor pardons sex offenders only in rare and extraordinary cases, and has not done so in several years. See People v Ansell, supra 25 Cal.4th 878 at page 868, fn. 18.

Availability of a Certificate of Rehabilitation to relieve punishment following felony conviction is a strong incentive to reform. Rehabilitation is a legitimate government objective with an "important and proper remedial purpose."

II. A STATUTE THAT RETROACTIVELY IMPOSES ANY DEGREE OF PUNISHMENT VIOLATES EX POST FACTO PROHIBITIONS, EVEN IF IT IS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT PURPOSE.

Apart from statutory disabilities, credential or license

revocation and other disqualifications in vocational and professional employment attending felony conviction that are primarily punitive, there are also statutes that combine punishment with a procedure that arguably serves a rational and legitimate government purpose. Mandatory police registration upon conviction of certain drug and sex crimes[9] are among such "mixed" statutes that punish as well as serve a legitimate government regulatory objective. To the extent such mixed statutes are in any manner punitive, ex post facto principles prohibits them from being applied retrospectively.

The issue of whether mandatory sex offender registration under §290 was punishment for ex post facto purposes was reviewed at length in the case of People v Castellanos (1999) 21 Cal.4th 785, 58 Cal.Rptr.2d 346, 982 P.2d 211. The defendant in Castellanos was convicted of several counts of burglary arising from his entry into college girls homes and theft of their underwear and money. The trial court ordered him to register with the police as a convicted sex offender under §290(a)(2)(E), a provision that became effective after he committed the burglaries. That order was reversed by the Court of Appeal on the ground that mandatory police registration was punishment, and its retrospective application violated ex post facto principles.

The California Supreme Court reversed, ruling the mandatory sex offender registration requirement does not constitute punishment for the purposes of ex post facto analysis. In so ruling, the Court, after lengthy analysis and numerous analogies, reluctantly acknowledged sex offender registration did in fact present a measure of punishment. However, concluding the registration requirement serves a legitimate government purpose, the Court disregarded the

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[9] Drug crime registration required by §11590 Health & Safety Code; Sex crime registration required by §290 et seq Penal Code.

punitive aspect of the statute, and focused on what was labeled the "important and proper remedial purpose" of the enactment.

A. IMPROPER BALANCING OF SOME GOVERNMENT INTEREST AGAINST AN EX POST FACTO STATUTE

Will balancing an "important and proper remedial purpose" or an otherwise legitimate government objective against punishment exonerate a statute from ex post facto prohibitions? According to Casetellanos and Ansell, Yes!

The Castellanos Court ruled the presence of a "proper remedial purpose" exempted the punitive nature of the statute from application of ex post facto prohibitions.

> "The sex offender registration requirement serves an important and proper remedial purpose, and it does not appear that the Legislature intended the registration requirement to constitute punishment. Nor is the sex offender registration requirement ***so punitive*** in fact that it must be regarded as punishment, despite the Legislature's contrary intent. Although registration imposes a ***substantial burden*** on the convicted offender, ***this burden*** is no more ***onerous*** than necessary to achieve the purpose of the statute. We conclude that the sex offender registration requirement imposed by section 290 does not constitute punishment for purposes of ex post facto analysis." (***emphasis*** added)
> People v Castellanos, supra 21 Cal.4th 785, at page 796.

There are two problems with the constitutional analysis in Castellanos applied to this case.

First, mandatory sex offender registration is admitted albeit reluctantly, to be punitive; but not "***so punitive***" to be

"regarded as punishment" and "is no more *onerous* than necessary".

Second, Petitioner Harper, by virtue of his §288 conviction, is subject to the punitive public notification provisions of section 290(m), and section 290.4, for which the Castellanos Court declined to express an ex post facto opinion.

In the First issue, punishment is either present or it is not. Not "so punitive" as to be "punishment" recalls an adage: "there is no such thing as a little bit pregnant". One is either pregnant, or not pregnant. It may be concealed, but it is present. Sophisticated language may drape the bulging punishment, and legal fiction may artfully conceal the protrusion, but the truth eventually emerges; mandatory police registration is punitive.

The Second constitutional problem in the Castellanos mandatory registration analysis has the effect of publicly stigmatizing the registered sex offender, arousing community passion, fear and hate against him with the public notification provision of the registration requirement that applies to Petitioner as a result of his sex offender conviction.[10] There is no need to parade the horrors of publicized events involving public outrage against sex offenders released in the community. Certainly public notification punishes, stigmatizes the sex offender ex-prisoner. Recognizing this reality, the Castellanos Court declared :

"It does not appear that defendant is subject to the

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[10] Petitioner Harper was convicted of violating Section 288. Public notification of the convicted sex offender's name/alias/gender/race/physical description/photo/date of birth/address/vehicle identification/type of victim/parole conditions/date of release from confinement, is required by §290 (m) and §290.4 Cal. Penal Code. See Appendix for text.

public notification provisions of section 290, subdivisions (m) and (n), and section 290.4, and we express no opinion regarding the effect, if any, that application of those provisions would have upon our analysis."
Castellanos, supra 21 Cal.4th 785, 796, fn. 6

Whether ex post facto protections extend to a statute even though the enactment may be rationally related to a legitimate public interest, raises the question of whether "government interest" or politically influenced legislative values are exceptions to override the Constitution.

The answer seems clear. Fundamental rights established by the Constitution outweigh regulatory statutes that arguably serve a governmental interest to the ex post facto detriment of citizens. Review of the history of the ex post facto clause confirms the absence of any "legitimate government interest" exception to ex post facto prohibition.

The Founding Fathers neither made nor suggested any exception to application of prohibited ex post facto laws. In Federalist No. 44, James Madison describes the ex post facto prohibition in the opening sentence of his commentary. He discourses extensively on the sundry principles of what is Article 9 of the Constitution, explaining the various principles, protections and government division of responsibility that might seem unclear. There is no exception to prohibition of ex post facto laws. The language is clear and unambiguous.[11]

This Court initially considered application of the ex post facto clause in Calder vs Bull (1798) 3 Dall 386, 1 L..Ed 648. The issue was whether a state statute that overturned the

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[11] THE FEDERALIST, National Home Library Found.. 1938, "The Federalist No. 44", 1788, A. Hamilton, pps 289-297.

decision of a probate court and ordered a new hearing on the validity of a will was an ex post facto law. The ex post facto claim was rejected on the basis the statute was civil rather than criminal. Justice Chase presented a four factor test for ex post facto laws that still applies two centuries later. Section 4852.01 satisfies number 3 of the test because it inflicts a greater punishment than required when the crime was committed:

> "3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed."
> Calder v Bull, supra 3 U.S. (3 Dall.) 386, at page 390.

Nowhere in the thorough analysis of Calder v Bull is there any language stating or suggesting an exception to application of ex post facto protections based upon a "legitimate government interest" in the statute.

In Weaver v Graham, a case of a prisoner still serving his sentence, this Court held that retroactive reduction in the availability of "good time credits" was an ex post facto law because it had the effect of increasing punishment.[12]

Weaver v Graham is directly analogous because the statute involved the rational and legitimate government objective of controlling prison inmate conduct by encouraging proper behavior through a system of "good time credits". The legitimate government purpose did not exempt ex post facto prohibitions against the punishment. This Court has not engrafted a "legitimate government interest" exception upon ex post facto prohibitions.

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[12] Weaver v Graham (1981) 450 U.S. 24, 67 L.Ed.2d 17, 101 S.Ct. 960.

Therefore, contrary to the rationale of People v Ansell, the "important remedial purpose" of the 1998 amendment to §4852.01 does not exempt the punitive element and effect of the statute from application of ex post facto protections. As in Weaver v Graham, amended §4852.01 may be applied prospectively, but not retrospectively to defendants whose convictions occurred before its enactment.

III WITHOUT A COMPELLING STATE INTEREST, EQUAL PROTECTION OF LAWS IS VIOLATED BY A STATUTE TARGETING ONLY CERTAIN SEX OFFENDERS TO REVOKE THEIR ELIGIBILITY APPLY FOR A §4852 CERTIFICATE OF REHABILITATION

The recent amendment to §4852.01 targets only certain ex-prisoner sex offenders to revoke their eligibility to apply for relief from the penalties and disabilities attending a felony conviction. The amendment treats this class of ex-prisoners differently from and more harshly than others, including kidnapers, robbers, burglars, arsonists and a host of other convicted felons who retain their opportunity for such relief and remain statutorily eligible to apply for a Certificate of Rehabilitation. The challenged statute implicates interests of "fundamental" importance, namely: Employment and Punishment.

Petitioner contends the statutory classification is not justified by a sufficient government objective, but in fact was an hysterical reaction enacted with an improper purpose and effect. The invalid discriminatory purpose (revealed in the Legislative History) is to prevent otherwise qualified ex-prisoner sex offenders from obtaining judicial relief available to felons of a different class. The improper effect is counter productive to legitimate government purposes by discouraging a class of ex-prisoners from the rational and laudable government goal of reformation and rehabilitation. Under these circumstances, the recent statutory amendment

violates equal protection principles.[13]

While research discloses no specific case authority defining "equal protection of laws", case law seems to focus on two concepts of the constitutional principle; one focuses on equal treatment while the other focuses on equal protection.[14] Analysis of the subject amendment to §4852.01 under either concept – treatment or results – reveals its constitutional infirmity.

Resolution of the equal protection issue of whether the government can identify a sufficiently important objective for its discrimination involves a three part test: (1) ascertaining the classification; (2) determining the appropriate level of judicial scrutiny; and, (3) deciding whether the government action meets the level of scrutiny.

A. CLASSIFICATION OF THE TARGET GROUP

The classification of the target group exists on the face of the statute:

> "CHAPTER 3.5. PROCEDURE FOR RESTORATION OF RIGHTS AND APPLICATION FOR PARDON
>
> 4852.01 Certificate of Rehabilitation
>
> . . . .
>
> (d) This chapter shall not apply to persons . . .

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[13] Amendment XIV to United States Constitution; "No State . . . deny to any person within its jurisdiction the equal protection of the laws."

[14] CONSTITUTIONAL LAW, Principles and Politics; §9.1.2; A framework for equal protection analysis, page 527; Erwin Chemerinsky, U.S.C. Legion Lex Professor of Law; Aspen Law & Business, 1997

convicted of a violation of subdivision [c] of Section 286, Section 288, subdivision [c] of Section 288a, Section 288.5, or subdivision [j] of Section 289 . . ." Section 4852.01 Penal Code

The above statutorily enumerated offenses specifically involve "lewd acts" or other sexual contact with "a person under the age of 14 years". Petitioner was convicted of violating §288. As the target of the challenged legislation, "the group is a discrete and insular minority against whom prejudice tends seriously to curtail the operation of political processes ordinarily to be relied upon protect minorities".[15]

As convicted sex offenders felons cannot vote while in prison or on parole. They are disqualified from the political process. Upon release from prison, they cannot simply pick up their lives from where they left off. Various civil penalties and political disabilities attending their felony conviction – penalties otherwise terminated or ameliorated by a Certificate of Rehabilitation – continue to plague them for a statutory period of at least 5 years after discharge from parole.[16]

This class of ex-prisoners – those having had sex with a person under the age of 14 years -- are perceived in our culture as despicable, reprehensible monsters having committed a particularly repugnant offense. Thus, these ex-prisoners have virtually no public sympathy, acceptance or political support. They have no lobby, no respected leader, no political voice. They have no group power, and no community or political support to protect them against discriminatory laws. Their protection is in constitutional

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[15] United States v Carolene Products (1938) 304 U.S. 144, 152,82 L.Ed.2d 1234, 58 S.Ct. 778

[16] §4852.03(a); 5 year period of rehabilitation, plus increases in specified circumstances..

principles; ex post facto and equal protection of laws. The efficacy of our democratic society is revealed in the treatment of its unpopular, and protection of its undesirable citizens.

In satisfaction of the Carolene Products requirement triggering "equal protection of laws" analysis, this class of ex-prisoner citizens is the vulnerable target "against whom prejudice tends to curtail the operation of political processes ordinarily to be relied upon to protect minorities." United States v Carolene Products (1938) 304 U.S. 144, 152, fn 4.

With identification of the target group or classification, the next step in "equal protection" analysis is selecting the appropriate level of judicial scrutiny to be applied.

This Court has made it clear that differing levels of scrutiny will be applied to the subject statute depending on the type of discrimination. In U.S. v Carolene Products, Co. this Court held "There may be narrower scope for operation of the presumptions of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments. . ." supra, 304 U.S. 144, at page 152 fn. 4.

1. STRICT SCRUTINY OF STATUTORY DISCRIMINATION BASED UPON SUSPECT FACTORS

Strict scrutiny is the applicable standard for a challenge for discrimination based upon inherently suspect factors such as race.[17] Discriminatory legislation upon the sex offender class of ex-prisoners can be analogized to racial discrimination on the basis of well known stigma, public rejection, hatred and inflamed passion. These ex-prisoners are often the

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[17] Yick Wo v Hopkins (1886) 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064

culturally indefensible target of public fear, hatred, prejudice and scorn, as were West Coast American citizens of Japanese ancestry who were interred during World War II.[18]

The class of offenders may also be analogized to aliens who are frequently the target of animosity, prejudice and discrimination, which is also subject to strict scrutiny.[19] This Court held in Graham v Richardson that "classification based on alienage, like those based on nationality or race, are inherently suspect and subject close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular minority for whom heightened judicial solicitude is appropriate.'" Ibid. 403 U.S. 365, at page 367 The target ex-prisoner class sex offenders is analogous to aliens in the following manner: lack of voting rights; disabilities in civil and political rights; discrimination in vocational as well as professional employment and widespread public rejection, and suspicion with Archie Bunker-like prejudice.

Under "strict scrutiny" a statute is upheld if it is proven necessary to achieve a compelling government purpose.[20] The government must have a truly significant reason for discriminating and it must show that it cannot achieve its objective through any less discriminatory alternative. The government has the burden of proof under strict scrutiny and

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[18] Korematsu v U.S. (1944) 323 U.S. 214, 89 L.Ed. 194 65 S.Ct. 193.

[19] Sugarman v Dougall (1973) 413 U.S. 634, 37 L.Ed.2d 853,93 S.Ct. 2842; New York unconstitutional statute preventing aliens from holding civil service jobs. In re Application of Fre Le Poole Griffiths for Admission (1973) 413 U.S. 717, 37 L.Ed.2d 910 935 S.Ct. 285; Mass. law barring resident aliens from admission to State Bar violated equal protection clause.

[20] Palmore v Sidoti (1984) 466 U.S. 429, 80 L.Ed.2d421 104 S.Ct. 1859; mix race unconstitutional basis to deny adoption

the statute will be upheld only if the government persuades the court that it is necessary to achieve a compelling purpose. Strict scrutiny is virtually always fatal to the challenged law.[21]

The government has a rational and legitimate purpose in protecting the public from violent and repeat offenders. Sexual offenders notoriously inflame passion and fear, however, there is significant difference between violent and non-violent offenders, high risk and non-repeat offenders. The Legislature has identified and categorized the "sexually violent predator"[22] and "high risk offender"[23] in the sexual offender registration statutes.

Petitioner Harper is neither. He does not fit the statutory categories of "sexually violent predator" or "high risk offender", yet as a consequence of his §288 conviction, he is subject to punitive public notification provisions. Such punishment is particularly indefensible in view of the absence of any similar public notification statutes for such violent and dangerous felons as those convicted of robbery, assault with a deadly weapon, arson, torture, mayhem, kidnaping and various violent, life threatening crimes that are not sexually motivated.

The amendment to §4852.01 that disqualifies ex-prisoners solely on the basis of a sexual offense against a minor without distinguishing between the identified class of

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[21] Professor Gerald Gunther described it as "strict in theory and fatal in fact." Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972)

[22] §290 subd (l)(2) categorizing the "sexually violent predator" as defined in §6600 Welfare & Institutions Code

[23] §290 subd (n)(1)(A) categorizing and defining a "high risk sex offender"

"sexually violent predators" or "high risk offenders" is overly broad, indefensibly punitive and unnecessarily discriminatory. The compelling government objective of protecting the public can be achieved with much less discrimination through the established procedures of §4852 that require judicial review and involve judicial discretion for granting relief based upon statutory standards of rehabilitation.

2. INTERMEDIATE SCRUTINY

Intermediate scrutiny is the next level or test for violation of equal protection and is used for discrimination based upon such factors as gender.[24]

Ex-prisoner of this statutory class are analogous to the gender discrimination in Kirchberg v Feenstra (1981) 450 U.S. 455, 67 L.Ed.2d 428, 101 S.Ct. 1195 holding unconstitutional a statue that allows men, but not women, to dispose of property without their spouse's consent. The analogy is found in the clear statutory provision retaining the eligibility of convicted robbers, burglars, arsonists and a host of other violent felons for a Certificate of Rehabilitation, but revoking child molester eligibility to apply for the same relief.

Under intermediate scrutiny a statute is upheld against constitutional attack if it is substantially related to an important government purpose. [25] The Court need not find the government's purpose "compelling" but it must characterize the objective as "important". Under intermediate

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[24] U.S. v Virginia (1996) 518 U.S. 515, 135 L.Ed.2d 735, 116 S.Ct. 2264; statute excluding women from Virginia Military Institute violates equal protection principles.

[25] Craig v Boren (1976) 429 U.S. 190, 197, 50 L.Ed.2d 397, 97 S.Ct. 451; gender based differential in sale of beer is unconstitutional.

scrutiny, the government has the burden of proof. This Court recently held the "burden of justification is demanding and that it rests entirely with the state."[26]

Under the intermediate scrutiny test, the 1999 amendment to §4852.01 should be ruled unconstitutional for violation of equal protection principles.

3. RATIONAL BASIS SCRUTINY

Rational basis review is the minimum level of scrutiny that all statutes challenged under equal protection must meet. Under this test, a statute will be upheld only if it is rationally related to a legitimate government purpose.[27]

Reformation and rehabilitation of ex-prisoners is both a legitimate and laudable government objective. While the government's legitimate objective need not be compelling and the means chosen only need be a rational way to accomplish the end, the circumstances of this challenge reveal the government objective to be improper and arguably invidious: namely, denial of relief to otherwise qualified ex-prisoners and discouragement of child molesters from seeking reformation.

Additionally, the challenged amendment is over inclusive because it applies to ex-prisoners who have not been demonstrated to be dangerous, violent or more anti-social than other ex-prisoners who remain eligible for the statutory relief.

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[26] U.S. v Virginia (1996) 518 U.S. 515, 135 L.Ed.2d. 735, 116 S.Ct. 2274, 2275

[27] Pennell v City of San Jose (1988) 485 U.S. 1, 14, 99 L.Ed.2d 1, 108 S.Ct. 849

4. DETERMINING APPROPRIATE LEVEL OF SCRUTINY

Various criteria are utilized in determining the level of scrutiny to be applied. Ability of the class or group to protect itself through the political process is an important consideration. This ex-prisoner class has no access to the political process for protection against prejudice and discrimination. To the contrary, they are often vulnerable targets.

These ex-prisoners, like aliens, cannot vote, thus the political process can not be trusted to represent their interests.[28] The history of discrimination against the class or group also is relevant in determining the level of judicial scrutiny. A related issue is a judicial determination concerning the likelihood the classification reflects prejudice as opposed to a permissible government purpose.[29]

Review of the Legislative History of amended §4852.01 reveals that was prompted by prejudice, inflamed stereotypes stigmatizing the target class of ex-prisoners, as well as anecdotal newspaper stories and reports in two central California cities, rather than legislative reliance upon appropriate and statistically valid surveys.

The Legislature's reliance upon unscientific, anecdotal and media generated news items as well as inflammatory appeal to passion is in the reported legislative hearings.

"According to a Sacramento Bee article dated October 5, 1995, 'convicted child molesters are using an obscure

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[28] Graham v Richardson (1971) 403, U.S. 365, 367, 29 L.Ed.2d 534, 91 S.Ct. 1848

[29] Cleburne v Cleburne Living Center (1985) 473 U.S. 432, 440, 87 L.Ed.2d 313, 105 S.Ct. 3249

> legal process to avoid the state's new, stricter sex offender registration laws and keep their names off the state's molester information telephone hotline. This 'obscure legal process' is the petition for a certificate of rehabilitation. An estimated 250 to 300 certificates are issued per year; sex offenses are one of the largest categories. . . PC Section 290 registrants currently number some 64,000 persons, about 60% of whom, or some 40,000, were found guilty of sex offenses against children."
> Assem Pub. Safety Comm.; Assem Bill 2017, page 3, March 6, 1996

First reported March 6, 1996 by the ASSEMBLY COMMITTEE ON PUBLIC SAFETY, AB 2017, concerning amendment to §4852.01, this Sacramento Bee newspaper article was quoted and referenced in the subsequent hearings on the statutory restrictions enacted concerning a Certificate of Rehabilitation. The San Jose Mercury News, another central California news paper, was quoted in the Senate hearings on this amendment for similar news items.

> "In October of 1995, the San Jose Mercury News reported that about 30 people had sought certificates of rehabilitation in Santa Clara County last year, and that about a quarter of them were for sex offenses. In addition, the Department of Justice has advised Committee members that, in its function of maintaining the sex offender registration list, it receives notice of about 30 certificates of rehabilitation for sex offenses a month."
> Senate Comm. On Crim. Proc. Assem Bill 2017; 06/25/96

Assuming, without conceding accuracy of the above numbers, 250 to 300 convicted felons, "a large category of which are sex offenders" who received Certificates of

Rehabilitation out of "40,000" convicted sex offenders of this class does not seem to be a statistically significant number; or even relevant. Less than 300 "sex offenders" who received Certificates of Rehabilitation, without identifying the sex offender class component, out of "40,000" class membership is 0.0075 per cent! Hardly a significant or compelling number upon which to base a statute that discriminates so heavily against the class.

By contrast, there are no Legislative History references to appropriate scientific sex offender or surveys based upon statistically valid parameters to support a "determination " that this class of offenders "pose a significantly higher rate of recidivism" than other identifiable groups of sex offenders, or other ex-prisoners. Apparently the legislators were influenced more by media hype regarding high profile sex crimes (Polly Klaus in central California) and inflammatory national coverage of the so-called Megen's Law, than statistically significant and valid data concerning sex offender recidivism in California.

It is clear from the opinion in People v Ansell that the state high court found the legislative history of the subject amendment to §4852.01 supports the constitutional validity of the statute.

> "The legislative history supports our determination that the amended statute applies under the circumstances of the present case. These materials disclose several reasons for the amendment, and suggest an intent to immediately affect the broadest range of cases. fn 20 [court takes judicial notice of legislative committee reports underlying enactment of section 4852.01(d)]."
>
> "First, based on the 'high recidivism rate," person convicted of sex crimes listed in section 4852.01(d) were deemed to be a threat to the public long after

their crimes are committed and any sentence is served. (Assem. Com. On Public Safety, Analysis of Assem. Bill No. 729 (1997-1998 Reg. Sess.) As introduced Feb. 26, 1997, pp. 1, 3) The Legislature doubted that rehabilitation could be "verifi[ed] in such cases; it assumed a risk of reoffense exits even where a judicial finding of reform is made, and feared that the public might be lulled into a false sense of security under such circumstances. The Legislature determined that the public is best protected by denying potential recidivists access to certificates of rehabilitation altogether." (emphasis added)
People v Ansell, supra 25 Cal.4th 868, 881

The Legislative History of AB 729, amending §4852.01, cited by the high court in Ansell relies upon undocumented, inflammatory speculation as well as suspicion of judicial inability to follow unambiguous statutory standards for rehabilitation in supporting passage of the restrictive and discriminatory amendment.

"According to the author, 'The crimes committed by these individuals creates a serious harm to victims and society as a whole. For that reason, they should not have the opportunity to have these convictions dismissed (sic) for any reason. It is wishful thinking to assume that a sex offender, simply by obeying the terms of their probation, has been rehabilitated and no longer poses a threat to society. The high recidivism rate for these type of criminals is ample evidence of the need for this bill.'"
Assem. Comm. On Pub. Safety, AB 729,
February 26, 1997

Two obvious fallacies are present in this Legislative History record: (1) argumentum ad hominem, or emotional appeal to the inflammatory nature of sex offender crimes

(whose convictions, incidently, are not dismissed by a certificate of rehabilitation); and (2) Politically based suspicion for the ability of the judiciary to properly determine statutorily defined rehabilitation. This latter issue is additional evidence of the wisdom of the Founding Fathers in establishing constitutional protections that apply to the least citizen, and a checks and balance system that protects the principle of separation of powers to prevent one branch of government from assuming or usurping control over another.

The circumstances of this case challenging the constitutional validity of an "ineligibility" statute show both unequal treatment and unequal results. Unequal because of all categories of felony criminal offenses, sex offenders in general and persons convicted of a sex offense with a minor in particular – the group targeted by the statute – constitute a small and disproportionate segment or class of ex-prisoners. Unequal in result because the great goal of rehabilitation, while extended to most ex-prisoners, is denied to this class whose opportunity for judicial confirmation and approval of their efforts is withdrawn by legislative fiat.

It is misleading for the Court in Ansell, in validating the discriminatory statue, to assert "The Legislature has provided more than one means by which, after the sentence is served, a convicted felon may ask the Governor for pardon, and may thereby seek release from certain civil disabilities attending the conviction." People v Ansell, supra 25 Cal.4th 868, 871

Misleading because it implies a gubernatorial pardon is the only means to obtain "release from certain civil disabilities attending the conviction." A Certificate of Rehabilitation, without a pardon, provides substantial although not complete relief from such statutory and extra legal punishments.

The Court in Ansell is further misleading in the assertion that ". . . convicted felons who claim to be reformed

have traditionally sought relief from the various consequences of their convictions through the Governor's power and discretion to grant pardons under the state Constitution. (People v Biggs [1937] 9 Cal.2d 508, 511 [71 P.2d 214, 116 ALR 205].)" The decision in Biggs is dated 1937. The statutory procedure to obtain a judicially determined Certificate of Rehabilitation was not enacted until 1943. See annotated §4852 et seq.

Moreover, a Governor's pardon is so unlikely and remote as to be illusory as a means to obtain "release from certain civil disabilities attending the conviction". Illusory because in practice, the Governor grants pardons to sex offenders in "only rare and extraordinary cases" and has not pardoned a sex offender of this class "in several years." Ansell, supra 25 Cal.4th 868, at page 878 fn. 18

In summary, a Certificate of Rehabilitation provides substantial, but not complete relief from the various civil and political disabilities and penalties attending felony conviction. Additionally it serves as a judicial recommendation for gubernatorial pardon. But even if not acted upon by the governor there is considerable relief to reformed ex-prisoners of this class from the penalties of felony conviction.

The only realistic avenue for relief from civil and political disabilities attending felony conviction that is open to sex offenders is the §4852 procedure for obtaining a Certificate of Rehabilitation. By cancelling the statutory opportunity and revoking the eligibility of this class of ex-prisoner to obtain this relief while retaining the opportunity and eligibility of robbers, burglars, arsonists and the host of violent and dangerous felons, constitutes two constitutional violations: ex post facto and denial of equal protection of law.

CONCLUSION

The petition for writ of certiorari should be granted for the purpose of ruling retrospective application of California Penal Code Section 4852.01 violates ex post facto prohibitions and the statute is repugnant to the principle of equal protection of the laws of the United States Constitution.

February _____, 2002

Respectfully submitted
Law Offices of Blomberg & Benson

/S/

_____
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Harvey William Harper

APPENDIX

Appendix A - Opinion of the Court of Appeal,
Fourth District, Division, State of California
Case No. E025062
Certified for Publication (not published).
Dated and Filed April 28, 2000 . . . . . 1a

Appendix B - Opinion of the Court of Appeal,
Fourth District, Division Two,
State of California, Case No. E025062
Order Modifying Opinion
and Decertifying it for Publication
Dated and Filed May 10, 2000 . . . . . 14a

Appendix C - Opinion of the Supreme Court,
State of California, Case No. S088651
4 DCA, Division Two, Case No E025062
Summary order Dismissing Review 16a

Appendix D - § 4852.01 California Penal Code 17a

Appendix E - § 290 California Penal Code 18a

Appendix E - § 290(m) California Penal Code 21a

Appendix F - § 290.4 California Penal Code 24a

APPENDIX A

CERTIFIED FOR PUBLICATION
Filed April 28, 2000

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO, STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent
v
HARVEY WILLIAM HARPER, Defendant and Appellant

E025062, Superior Court Case Nos. OCR 10208/13307

OPINION

APPEAL from the Superior Court of San Bemardino County,.Gerard S. Brown, Judge. Affirmed.

Law Offices of Blomberg & Benson and John L. Benson for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Gary w. Schons, Senior Assistant Attorney General, and Rhonda L. Cartwright-Ladendorf, Supervising Deputy Attorney General, for Plaintiff and Respondent.

In this case, we reconsider this division's 1983 decision in Sovereign v. People (1983) 144 Ca1.App.3d 143. In Sovereign, we held that retroactive application of a statute increasing the waiting period before an ex-prisoner could apply for a certificate of rehabilitation violated ex post facto principles. In this case, we find that *Sovereign* has been effectively overruled by our Supreme Court's recent decision in *People* v. Castellanos (1999) 21 Cal.4th 785

Accordingly, we expressly oveuule *Sovereign.*

Four other recent appellate court cases follow the principles stated in *Castellanos.*

The trial court relied on *People* v. *Ansell* (1999) 71 Cal.App.4th 1285, review granted (SO79744). In that case, our colleagues in the Third District refused to follow Sovereign and held that a statutory amendment which made certain sex offenders ineligible for a certificate of rehabilitation and pardon did not violate ex post facto principles.

The Supreme Court has also granted review in *People* v. *Lugas* (1999) 76 Cal.App.4th 696, review granted (SO85015). In *Lugas,* our colleagues in the Sixth District disagree with *Sovereign,* finding that it misapplied early Supreme Court cases.

The court rejected the ex post facto claim because defendant Lugas did not identify an increase in punishment resulting from application of the amended statute to him.

In addition, the Supreme Court has granted review in *People* v. *Woodson* (1999) 76 Cal.App.4th 1051, review granted (S085092).[1] In that case, our colleagues in Division Four of the First District found that the analysis in *Sovereign* cannot be reconciled with the discussion in Castellanos. It therefore concluded that Sovereign was no longer viable.[2]

In *People v. Acuna* (2000) 77 Cal.App.4th 1056, the court followed *Castellanos* and held that the statutory elimination of a possibility for expungement or a conviction for violating Penal Code section 288 was not punishment and did not violate ex post facto laws.[3]

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[1] Since the Supreme Court has granted review in *Ansell, Lugas* and *Woodson*, the cases are not citable as precedent. (Cal. Rules of Court, rules 976(d), 977.) We discusss those cases only to explain our reasoning, and do not give them any precedential value.

[2] In an earlier opinion, the Woodson Court followed Sovereign. (People v Woodson, supra, 74 Cal.App.4th 1165, rehearing granted.) The court granted rehearing and reconsidered the issue in the light of the recent Castelianos opinion.

[3] Unless otherwise indicated, all further statutory citations are to the Penal Code.

After reviewing *Sovereign* in light of these cases, we will conclude that it should be overrule, and that this district should follow the principles stated in Castellanos.

FACTS AND PROCEDURAL HISTORY

On March 25, 1999, defendant Harper filed a petition for a certificate of Rehabilitation and recommendation for pardon pursuant to section 4852;01 et seq. The petition alleged that, in 1986, defendant Harper had been convicted of attempted incest (§§ 285,664) and child molestation (§ 288, subd. (a)). In 1988, he pled guilty to a charge of willful failure to appear after release on bail (§ 1320.5).

The petition also alleged that defendant was sentenced to a term of 12 years and 4 months in state prison. He was released from prison on February 8, 1994, and was placed on parole for three years. He was discharged from parole on February 8, 1997. He alleges that he has been rehabilitated and has led an exemplary life in the five-year period following his release from prison.

The trial court denied the petition on grounds that the current version of section 4852.01 denies any relief to a person convicted of a violation of section 288. As noted above, the trial court relied on *People v. Ansell, supra,* 71 Cal.App.4th 1285, review granted (SO79744). Since review has been granted by our Supreme Court the case is no longer citable as precedent. (Cal. Rules of Court, rules 976(d), 977.)

Defendant's main contention on appeal is that, since the disqualifying provision was not enacted until 1997, its application to him violates the constitutional provision against ex post facto laws because it imposes additional punishment on him for his earlier crime. He relies on *Sovereign* to support his contention that his case should be governed by the statute in effect when he began his statutory waiting period in 1994.

THE STATUTORY PROCEDURES

The California Constitution gives the Governor general authority to grant reprieves, pardons and commutations of sentence. (Cal. Const., art. V, § 8; § 4800.) The statutes authorize

the Board of Prison Tenns to recommend candidates for pardon to the Governor. (§ 4801.) A former prisoner may also apply directly for a pardon. (§§ 4802, 4803.)

The statutes also provide another method of seeking a pardon. Under section 4852.01, et seq., a former prisoner may flrst apply for a certificate of rehabilitation. This avenue provides "an additional, but not an exclusive, procedure for the restoration of rights and application for pardon." (§ 4852.19.) Ifa certificate of rehabilitation is granted, it acts as an application for a full pardon. (§ 4852.16.) The Governor is authorized to issue a pardon without further investigation. However, such pardons are rarely issued, and executive clemency is granted in relatively few situations.

Even if a pardon is not granted, the obtaining of a certificate of rehabilitation has one significant effect: it relieves a convicted sex n offender of the duty to register as a sex offender under section 290. (§ 290.5.) Because the statutory procedure was being used by convicted sex offenders to avoid the registration requirement, the Legislature enacted the 1996 and 1997 amendments. Under these amendments, the waiting period to obtain a certificate of rehabilitation was increased for offenses which required sex offender registration (§ 4852.03, subdc (a)(2)); certain sex offenders were declared ineligible for a certificate of rehabilitation, although they could still be pardoned if the Governor found the existence of extraordinary circumstances (§ 4852.01); an~ certain sex offenders were declared ineligible for a certificate of rehabilitation if the court finds that they present a continuing threat to minors (§ 4852.13, subd. (b)).

The procedure for obtaining a certificate of rehabilitation requires a showing that the former prisoner meets the statutory requirements. (§ 4852.01.) If the former prisoner qualifies for a certificate of rehabilitation, he or she may apply for a certificate after service of a minimum rehabilitation period. (§§ 4852.03,4852.06.) After serving the minimum period of rehabilitation, the former prisoner files the petition and a hearing is held. (§§ 4852.06,4852.1.) If the court finds that the petitioner has demonstrated rehabilitation, "the court may make an order declaring that

the petitioner has been rehabilitated, and recommending that the Governor grant a full pardon to the petitioner . This order shall be filed with the clerk of the court, and shall be known as a certificate of rehabilitation." (§ 4852.13.) The certificate may be the basis for the issuance of a full pardon by the Governor. (§§ 4852.13,4852.16.)

To obtain a certificate of rehabilitation, the defendant must establish his good conduct and rehabilitation during a rehabilitation period. The rehabilitation period begins upon release from prison and continues for a base period of five years, plus an additional two, four, or five years, depending on the offense. (§ 4852.03.) Under the current statute, defendant is ineligible for a certificate of rehabilitation because he has not served a IO-year rehabilitation period. Also, as noted above, defendant Harper is not eligible for a certificate of rehabilitation because the current statute specifies that persons convicted of certain sex offenses. including violations of section 288. are ineligible for a rehabilitation certificate. (§ 4852.01, subd. (d).) The trial court therefore denied the petition on these grounds.

ISSUE

Defendant commenced his rehabilitation period upon his release from prison in February 1994. At that time, the statute provided that a certificate of rehabilitation was available if defendant had not been incarcerated since his release, if he was a resident in the state for a three-year period prior to filing his request for the certificate, and the court found that he had been rehabilitated. (Stats. 1976, ch. 434, § 2; § 4852.13.) Although defendant contends that he met all the eligibility requirements of the former statute, the trial court did not make any factual detenninations on the rehabilitation issue because it found defendant disqualified under the current statute.

Defendant's current ex post facto contention is based on the facts that (I) the amendment disqualifying certain sex offenders was added in 1997, effective January 1, 1998 (Stats.

1997, ch. 61, § 2),[4] and (2) the amendment extending the basic waiting period to five years was added in }996, effective January 1, 1997. (Stats. 1996, ch. 981,
§ 3.) The issue to be determined is whether ex post facto principles were violated because statutory amendments enacted after commencement of defendant Harper's rehabilitation period (1) declared him ineligible to apply for a certificate of rehabilitation because of the nature of his prior offense; and (2) lengthened the rehabilitation period applicable to him from three to seven years after he had commenced serving the rehabilitation period.

EX POST FACTO PRINCIPLES

Defendant argues that application of the current statutes to him violates the ex post facto clauses of the United States and/or California Constitutions.[5] He relies on the discussion of ex post facto principles in the United States Supreme Court case of *Collins v. Young blood* (1990) 497 U.S. 37. The issue in that case was whether the ex post facto clause was violated when a Texas statute which allowed the reformation of an improper jwy verdict was passed after defendant's crime and it was applied to him. The Supreme Court rejected defendant's ex post facto claim by focusing on the deflnition of an ex post facto law. Itreaffmned the definition in *Beazell v. Ohio* (1925) 269 U.S. 167: "'[A]ny statute which punishes as a crime an act previously committed, which was innocent when done~ which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed. ...'" *(Collins,* at p. 42.) Accordingly, "Legislatures may not

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[4] By request filed September 21, 1999, respondent has requested that we take judicial notice of certain legislative history documents relating to the intent of the Legislature in adopting the 1997 amendments. The request is granted, and we take judicial notice of the proffered documents. (Evid. Code, §§ 452, 459.)

[5] Since there is no significant difference between the two provisions, we will refer to general ex post facto principles. (People v Mills (1992) 6 Cala.App.4th 1278, 1283.)

retroactively alter the definition of crimes or increase the punishment for criminal acts.;' *(Id.,* at p. 43.) Defendant there conceded that the Texas procedural statute did not meet this definition, but nevertheless argued that the ex post facto clause also applied to statutes that deprived a defendant of a substantial protection of existing law. *(Id.,* at p. 44.) The Supreme Court rejected this assertion and held that the Texas statute did not violate the ex post facto clause because it did not redefine a crime, abolish a defense, or increase punishment. *(Id.,* at p. 52.)

Defendant therefore contends that the statutory amendments made retroactively applicable to him by the trial court's ruling impermissibly increased his punishment for his prior crime.

Defendant relies on this court's decision in *Sovereign* v. *People, supra,* 144 Cal.App.3d 143. In *Sovereign,* defendant was released from prison in 1978, and was discharged from parole fu 1979. In 1981 he filed a petition for rehabilitation, and the petition was granted in August 1981. *(Id.,* at p. 145.) In 1982 the People moved to set aside the order granting the petition on grounds that defendant had not completed the waiting period. The contention was based on a 1980 statutory amendment which lengthened the waiting period. *(Id.,* at p. 146.) The trial court rejected the contention and denied the motion to vacate, ruling that application of the amended statute to defendant would subject hini to increased punishment for his crime, in violation of the ex post facto clauses of the federal and state Constitutions. *(Id,* at pp. 146-147.) We affmned.

Sovereign first discusses the punishment for crimes, noting that punishment in the form of statutory disabilities continues long after completion of a prison term. *(Id,* at p. 148.) It then fmds that a certificate of rehabilitation and executive pardon eliminates or significantly ameliorates those disabilities. *(Id.,* at p. 149.) We therefore stated: "The ex-prisoner is subject to a variety of penalties because of his criminal conviction which the certificate of rehabilitation can, either directly or indirectly, effectively remove.
Therefore, by increasing the waiting period requisite to filing a petition for the certificate, the amendment to section 4852.03 prolongs the time during which ex-prisoners remain subject to such penalties. Hence, we must detennine whether, as applied to

petitioner, the amendment imposes an additional punishment prohibited by the ex post facto clauses" *(Sovereign* v. *People, supra,* 144 Cal.App.3d 143, 149-150.)

After discussing basic ex post facto principles, we rejected the People's argumel that the extension of the waiting period did not inflict greater punishment on the defendant. *(Sovereign* v. *People, supra,* 144 Cal.App.3d 143, 151.) We therefore held that "[t]he ex post facto clause protects the petitioner's *opportunity* under the fonner statute to file his petition on the date prescribed by the statute in effect when he completed his prison term and commenced the waiting period." *(Id.,* at p. 152, fu. omitted.) Accordingly, the ex post facto clause prohibited application of the amended section to persons who commenced the waiting period before the amended version went into effect. *(Id,* at p. 152, fu. 2.)

Sovereign concludes: "If denying persons their civil and political rights, disqualifying them from office, excluding them from positions of trust or employment, and revoking their privilege of appearing in the courts constitutes 'punishment, , then surely prolonging the time that ex-prisoners remain subject to these penalties constitute punishment, as well. As earlier noted, this would be precisely the effect of applying the amendment to petitioner herein. Hence we conclude that the trial court properly calculated petitioner's waiting period under the version of section 4852.03 in effect wh, he completed his term and commenced the waiting period. To have done otherwise would have been a manifest violation of the constitutional prohibitions against ex post facto laws." *(Sovereign* v. *People, supra,* 144 Cal.App.3d 143, 154.) *Sovereign* thus fully supports the position taken by defendant Harper here.

PEOPLE v. CASTELLANOS

In *People* v. *Castellanos, supra,* 21 Cal.4th 785, our Supreme Court addressed the issue of whether the sex offender registration requirement constituted punishment for purposes of ex post facto analysis. The court held that it did not: "The sex offender registration requirement serves an important and proper remedial purpose, and it does not appear that the Legislature intended the registration requirement to constitute punishment. Nor is the sex offender registration requirement so puiritive in fact that it must be regarded as punishment, despite the Legislature's contrary intent. Although registration imposes a

substantial burden on the convicted offender, this burden is no more onerous han necessary to achieve the purpose of the statute. We conclude that the sex offender registration requirement imposed by section 290 does not constitute punishment for purposes of ex post facto analysis." *(Id,* at p. 796, fn. omitted.) If the sex offender registration requirement is not punishment, it follows that changes in that requirement which increase the waiting period or eliminate the procedure for persons convicted of certain crimes are not punishment.

OTHER RECENT CASES

In *People* v. *Woodson, supra,* 76 Cal.App.4th 1051, review granted, the court considered a provision which extended the waiting period before petitioner could apply for a certificate of rehabilitation. After applying *Castellanos* and finding that the additional waiting period requirement did not constitute punishment, the court commented on Sovereign: "While the *Sovereign* court held that retroactive application of the amendment to section 4852.03 violated the constitutional prohibitions against ex post facto laws because the extension of the waiting period constituted punishment, its analysis cannot be reconciled with *Castellanos.* Accordingly, we conclude that Sovereign is no longer viable." *(Id.,* at p. 1055.)

People v. *Lugas, supra,* 76 Cal.App.4th 696, review granted, relies on *Kansas* v. Hendricks (1997) 521 U.S. 346, a case which is also discussed in Castellanos. Hendricks held that a Kansas statute which provided for civil commitment of sex offenders did not violate ex post facto principles because the proceedings were civil proceedings and because "commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence. The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct." *(Kansas* v. Hendricks, supra,'521 U.S. 346,361-362.} The Supreme Court also found that the legislation had no scienter requirement, characterizing the presence or absence of such a requirement as an important element in distinguishing civil and criminal statutes. Finally, it found no deterrent purpose because persons subject to the Act were suffering from mental disorders that made it unlikely that they would be deterred by the threat of confinement. *(Id.,* at pp.

362-363.) Since the Act was nonpunitive, ex post facto principles were inapplicable *(Id,* at pp. 370-371.) Additionally, ex post facto principles were inapplicable because "the Act does not criminalize conduct legal before its enactment, nor deprive Hendricks of any defense that was available to him at the time of his crimes. . . . ." *(Id,* at p. 371.)

Finally, *Lugas* relies on the following quotation from *Hendricks:* '" Although we recognize that a "civil label is hot always dispositive," [citation], we will reject the legislature's manifest intent only when a party challenging the statute provides "the clearest proof' that "the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention to deem it 'ciVil.'" [Citation.]' [Citation.]" *(People* v. Lugas, supra, 76 Cal.App.4th 696, 704- 705, review granted.)

In *People v. Acuna, supra,* 77 Cal.App.4th 1056, the court held that a 1997 amendment to section 1203.4 which prohibited expungement *for* convictions of violating section 288 did not violate ex post facto principles. The court relied on *Castellanos* and held that the amendment was not punitive in intent, nature or effect~ Thus, ex post facto principles did not prevent application offue amendment to defendant. *(Acuna,* at p. 1059-1060.)

The statutory scheme for obtaining a certificate of rehabilitation is essentially an administrative mechanism which allows a former prisoner to apply for a pardon: "Nothing in the statutory scheme regarding certificates of rehabilitation suggests that any limitation on the opportunity to obtain a certificate is. intended primarily to achieve the objectives of criminal punishment, i.e., to increase punishment for or deter others from committing the underlying crimes of which a petitioner was convicted. Instead, a certificate of rehabilitation is formal recognition of socially positive behavior following discharge from custody or release on parole or probation, a first step toward a gubernatorial pardon based upon rehabilitation." *(People* v. *Lugas, supra,* 76 Cal:App.4th 696,705, review granted.)

The amendment to the statute which extended the waiting period before certain former prisoners could apply for a certificate of rehabilitation was thus a change in procedure which did not constitute an increase in punishment for the past crime.

Similarly the amendment which made certain fonner prisoners ineligible to apply for a certificate of rehabilitation was not a retroactive increase in punishment. Other ways still existed for a former prisoner to apply for a pardon. Although the procedure may have become more difficult, *Collins* makes it clear that a disadvantage is not enough.

Specifically, *Collins* holds that ex post facto principles concern retroactive changes in the definition of a crime, or retroactive increases in punishment: "The right to jury trial provided by the Sixth Amendment is obviously a' substantial' one, but it is not a right that has anything to do with the defmition ofcrimes, defenses, or punishments, which is the concern of the *Ex Post Facto* clause." *(Collins* v. *Young blood, supra,* 497 U.S. 37,51.) *Collins* specifically rejected earlier cases holding that ex post facto principles apply to changes which alter the defendant's situation to his disadvantage (Id, at pp. 48-50.) Thus, as noted above, the issue is whether the statutory amendments here retroactively increased punishment for the prior crime. We agree with *Lugas* that they did not. "Even if the 1996 amendment of section 4852.13 disadvantaged Lugas by reducing the opportunity for obtaining a certificate of rehabilitation, it does not necessarily follow that the statutory change, as applied to him, violated the constitutional prohibition of ex post facto laws. Lugas has not specified any disability that remains as a result of the application of section 4852.13, as amended in 1996, to his petition, and the consequent denial of the petition, that criminally punishes him for the crimes of which he was convicted." *(People v. Lugas, supra,* 76 Cal.App.4th 696,705, review granted.)

The same principle applies here. Defendant Harper has been disadvantaged by the amendments, but the punishment specified for his fonner crimes has not been increased. He has merely been prohibited from using the certificate of rehabilitation method to apply for a pardon.

A similar result was recently reached in *People* v. *Shro.lJ(2000)* 77 CaLApp.4th 663, review granted (S086060).[6] That case involved section 1203.4, a related procedure for expungement of convictions of probationers. Although the crimes were committed prior to the effective date of the amendment, the court found no violation of ex post facto principles. Although petitioners relied on *Sovereign,* the court found it to be essentially vitiated by Collins: "[Petitioners '] reliance on *pre-Collins* cases [citations, including Sovereign] to the effect that the elimination of the right to expungement is an increase in punishment is of little value in current ex post facto analysis under *Collins.* [Citation.]" (Shroff, at p. 671.) Applying *Collins,* the court held that, although the subsequent amendments disadvantaged petitioners, who would otherwise have been able to have their convictions expunged, the court found that the disadvantage did not constitute an increase in the penalty for the crimes they committed. *(Id.,* at p. 670.) The court thus said: "Nor was the 1997 amendment punishment Within the meaning of the constitutional prohibitions against ex post facto laws because it (1) was unrelated to the length or nature of the defendant's incarceration or constructive custody, (2) did not increase imprisonment, forestall parole or extend probation, (3) did not decrease the trial court's discretion to impose the most appropriate sentence for the defendant and (4) involved a collateral matter that did not change the primary effect of the convictions. [Citation.]" *(Id.,* at pp. 670-671, fu. omitted.) Now that *Castellanos* has also held that the sex offender registration requirement is not punishment, it is clear that there is no violation of ex post facto principles.

Based on the foregoing, we agree with *Woodson* that Castellanos effectively overruled *Sovereign. (People* v. *Woodson, supra,* 76 Cal.App.4th 1051, 1055, review granted.) Since the other recent cases discussed above agree that a sex offender registration requirement is not punishment, or fmd that a particular statutory amendment is not punitive, we fall into. step with them by fmding that *Sovereign* is no longer viable. Since *Sovereign* was essentially overruled by *Castellanos* and *Collins,* the fact that the subsequent amendment disadvantaged defendant

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[6] As with the other review granted cases, we cite *Shroff* only to explain our reasoning. We do not give the case any precedential value. Presumably, defendant Harper's case, like the others, will be granted review pending the Supreme Court's decision in *Ansell.* The only difference here is our express overruling of our earlier decision in *Sovereign.*

Harper is not a sufficient basis for concluding that the amendment increased the punishment for the prior crime. Since *Sovereign* originated in this district, we exercise our privilege to overrule it as incorrectly decided.

In supplemental briefing, defendant relies on section 3, which states that no part of the Penal Code is retroactive unless expressly so declared. A similar argument was rejected in *People v. Lugas, supra,* 76 Cal.App.4th 696, 707- 709, review granted and People v. Acuna, supra, 77 Cal.App.4th 1056, on grounds that the petition was decided under the law in effect at the time of the decision. We reject defendant Harper's contention for the reasons stated in those cases. (See also, *People* v. *Woodson, supra,* 76 Cal.App.4th 1051, 1055, fn. 2, review granted.)

DISPOSITION

The order denying a petition for rehabilitation is affirmed.

CERTIFIED FOR PUBLICATION

HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

RICHLI
J.

APPENDIX B

CERTIFIED FOR PUBLICATION
Filed May 10, 2000

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO, STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent,

v

HARVEY WILLIAM HARPER, Defendant and Appellant.

E 025062, Superior Court Case Nos. OCR 10208/13307

ORDER MODIFYING OPINION AND DECERTIFYING IT FOR PUBLICATION - NO CHANGE IN JUDGMENT

THE COURT:

It is order that the opinion filed herein on April 28, 2000, be modified as follows:

1. On page 2, the last sentence of footnote 1 is modified to read as follows:

   We mention those cases only to note that they are presently pending in the Supreme Court. L We do not give those cases any precedential value.

2. The following sections included in the section OTHER RECENT CASES are deleted:

   The heading OTHER RECENT CASES on page 11.

   The full paragraph on the bottom of page 11 beginning "In *People v Woodson*" through the first paragraph on page 13 ending with "review granted.)"

   Third line of the third paragraph on page 13 beginning "Nothing in t he statutory" through the

end of that paragraph ending on page 14 with "review granted.)"

Second full paragraph on page 14, the sentence beginning "We agree with *Lugas*" through the first sentence of the first full paragraph on page 16, ending "is not punitive, we fall into step with them by finding." The remainder of that sentence is modified to read: "We therefore conclude that *Sovereign* is no longer viable."

First full paragraph on page 17 beginning "In supplemental briefing" to its end.

3. In the second full paragraph on page 14, line 9, after the sentence ending in "prior crime" and "We find they did not."

The opinion was originally certified for publication. It now appears that it does not in fact meet the standards for publication and it is therefore ordered not to be published.

There is no change in the judgment.

HOLLENHORST
Acting P.J.

McKINSTER
J.

RICHLI
J.

APPENDIX C

Court of Appeal, Fourth Appellate District, Div Two No. E025062

S088651

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed November 14, 2001)

THE PEOPLE, Respondent,

v.

HARVEY WILLIAM HARPER, Appellant.

Pursuant to rule 29.4(c), California Rules of Court, the above-entitled review is DISMISSED and cause is remanded to the Court of Appeal, Fourth Appellate District, Division Two.

George

Chief Justice

Kennard

Associate Justice

Baxter

Associate Justice

Werdegar

Associate Justice

Chin

Associate Justice

Brown

Associate Justice

Moreno

Associate Justice

APPENDIX D

Section 4852 et seq Penal Code

CHAPTER 3.5 PROCEDURE FOR RESTORATION OF RIGHTS AND APPLICATION FOR PARDON

4852.01 Certificate of Rehabilitation

(a) Any person convicted of a felony who has been released from a state prison or other state penal institution or agency in California, whether discharged on completion of the term for which he or she was sentenced or released on parole prior to May 13, 1943, who has not been incarcerated n a state prison or other state penal institution or agency since his or her release and who presents satisfactory evidence of a three-year residence in this state immediately prior to the filing of the petition for a certificate of rehabilitation and pardon provided for by this chapter, may file the petition pursuant to the provisions of this chapter.

(b) Any person convicted of a felony who, on May 13, 1943, was confined in a state prison or other institution or agency to which he or she was committed and any person convicted of a felony after that date who is committed to a state prison or other institution or agency may file a petition for a certificate or rehabilitation and pardon pursuant to the provisions of this chapter.

(c) Any person convicted of a felony or any person who is convicted of a misdemeanor violation of any sex offense specified in Section 290, the accusatory pleading of which has been dismissed pursuant to Section 1203.4, may file a petition for certificate of rehabilitation and pardon pursuant to the provisions of this chapter if the petitioner has not been incarcerated in any prison, jail, detention facility, or other penal institution or agency since the dismissal of the accusatory pleading and is not on probation for the commission of any other felony, and the petitioner is not on probation for the commission of any other felony, and the petitioner presents satisfactory evidence of five years residence in this state prior to the filing of the petition.

(d) This chapter shall not apply to person serving a mandatory life parole, person committed under death sentence, persons

convicted of a violation of subdivision (c) of Section 286, Section 288, subdivision (c) of Section 288a, Section 285.5, or subdivision (j) of Section 289, or person in the military service.

(e) Notwithstanding the above provisions or any other provision of law, the Governor shall have the right to pardon a person conviction of a violation of subdivision (c) of Section 286, Section 288, subdivision (c) of Section 288a, Section 285.4, or subdivision (j) of Section 289, if there are extraordinary circumstances. (AM '74, '76, '94, '96, '97)

APPENDIX E

§ 290 CALIFORNIA PENAL CODE

290. Person Convicted of Certain Lewd Crimes Must Register With Sheriff

(a)(1)(A) Every person described in paragraph (2), for the rest of his or her life while residing in, or, if he or she has no residence, while located within California, or while attending school or working in Calfiofnria, as described in subparagraph (G), shall be required to register with the chief of police of the city in which he or she is residing, or if he or she has no residence, is located, or the sheriff of the county if he or she is residing, or if he or she has no residence, is located, in an unincorporated area or city that has no police department, and additionally, with the chief of police of a campus of the University of California, the California State University, or community college if he or she is residing, or if he or she has no residence, is located upon the campus or ain any of its facilities, within five working days of coming into, or changing his or her residence or location within, any city, county, or city and county, or campus in which he or she temporarily resides, or, if he or she has no residence, is located.

. . . . . .

(D) Beginning on his or her first birthday following registration or change of address, the person shall be required to register annually, within five working days of his or her birthday, to update his or her registration with the entities described in subparagraph (A), including, verifying his or her name and address, or temporary location, and place of employment including the name and address of the employer, on a form as may be required by the Department of Justice.

(E) In addition, every person who has ever been adjudicated a sexually violent predator, as defined in Section 6600 of the

Welfare and Institutions Code, shall after his or her release from custody, verify his or her address no less than once every 90 days and place of employment, including the name and address of the employer, in a manner established by the Department of Justice.

. . . . . .

(2) The following persons shall be required to register pursuant to paragraph (1):

(A) Any person who, since July 1, 1944, has been or is hereafter convicted in any court in this state or in any federal or military court of a violation of Section 207 or 209 committed with intent to violate Section 261, 286, 288, 288a, or 289, Section 220, except assault to commit mayhem, Section 243.4, paragraph (1), (2), (3), (4), or (6) of subdivision (a) of Section 261, or paragraph (1) of subdivision (a) of Section 262 involving the use of force or violence for which the person is sentenced to the state prison, Section 264.1, 266, 266c, subdivision (b) of Section 266h, subdivision (b) of Section 266i, 266J, 267, 269, 285, 286, 288, 288a, 288.5, or 289, subdivision (b), (C), or (d) of Section 311.2, 311.4, 311.10, 311.11, or 647.6, former Section 647a, subdivision (C) of Section 653f, subdivision 1 or 2 of Section 314, any offense involving lewd or lascivious conduct under Section 272, or any felony violation of Section 288.2; or any person who since that date has been or is hereafter convicted of the attempt to commit of the above-mentioned offenses.

. . . . . .

(e) Any person ordered by any court to register pursuant to this section for any offense not included specifically in this section if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the reasons for requiring registration.

. . . . . .

(F)(I) Notwithstanding any other subdivision, a person who was convicted before January 1, 1976, under subdivision (a) of Section 286, or Section 288a, shall not be required to register pursuant to this section for that conviction if the conviction was for conduct between consenting adults that was decriminalized by Chapter 71 of the Statutes of 1975 or Chapter 139 of the Statutes of 1976. The Department of Justice shall remove that person from the Sex Offender Registry, and the person is discharged from his or her duty to register pursuant to the following procedure: . . .

. . . . . .

(l)(2) Every person who, as a sexually violent predator, as defined in Section 6600 of the Welfare and Institutions Code, is required to verify his or her registration every 90 days, shall be notified wherever he or she next registers of his or her increased registration obligations. . . . . .

(m)(1) When a peace officer reasonably suspects, based on information that has come to his or her attention through information provided by any peace officer of member of the public, that a child or other person may be at risk from a sex offender convicted of a crime listed in paragraph (1) of subdivision (a) of Section 290.4, a law enforcement agency may, notwithstanding any other provision of law, provide any of the information specified in paragraph (4) of this subdivision about that registered sex offender that the agency deems relevant and necessary to protect the public, to the following person, agencies, or organizations the offender is likely to encounter, including but not limited to, the following:

(A) Public and private educations institutions, day care establishments, and establishment and organizations that primarily serve individuals likely to be victimized by the offender.

(B) Other community members at risk.

(2) The law enforcement agency may authorize persons and entities who receive the information pursuant to paragraph (1)

to disclose information to additional persons only if the agency does the following:

(A) Determines that all conditions set forth in paragraph (1) have been satisfied regarding disclosure to the additional persons.

(B) Identifies the appropriate scope of further disclosure.

(3) Persons notified pursuant to paragraph (l) may disclose the information provided by the law enforcement agency in the manner and to the extent authorized by the law enforcement agency.

(4) The information that may be disclosed pursuant to this section includes the following:

(A) The offender's full name.

(B) The offender's know aliases.

(C)The offender's gender.

(D) The offender's race.

(E) The offender's physical description.

(F) The offender's photograph.

(G) The offender's date of birth.

(H) Crimes resulting in registration under this section.

(I) The offender's address, which must be verified prior to publication.

(J) Description and license plate number of offender's vehicles or vehicles the offender is known to drive.

(K) Type of victim targeted by the offender.

(L) Relevant parole or probation conditions, such as one prohibit contact with children.

(M) Dates of crimes resulting in classification under t his section.

(N) Date of release from confinement.

However, information disclosed pursuant to this subdivision shall not information that would identify the victim.

(5) If a law enforcement agency discloses information pursuant to this subdivision, it shall include, with the disclosure , a statement that the purpose of the release of the information is to allow members of the public to protect themselves and their children from sex offenders.

(6) For purposes of this section, "likely to encounter" means both of the following:

(A) That the agencies, organizations, or other community members are in a location or in close proximity to a location where the offender live or is employed, or that the offender visits or is likely to visit on regular basis.

(B) The types of interaction that ordinarily occur a that location and other circumstances indicate that contact with the offender is reasonably probable.

(7) For purposes of this section, "reasonably suspects" means that it is objectively reasonably for a peace officer to entertain a suspicion, based upon facts that could cause a reasonable persona in a like position, drawing when appropriate on his or her training and experience, to suspect that a child or other person is at risk.

(8) For purposes of this section, "at risk" means a person is or may be exposed to a risk of becoming a victim of a sex offense committed by the offender.

(9) A law enforcement agency may continue to disclose information on a offender under this subdivision for as along as the offender is include in Section 290.4.

(N) In addition to the procedures set forth elsewhere in this Section, a designated law enforcement entity may advise the public of the presence of high-risk sex offender in its community pursuant to this subdivision. . . .

. . . . . .

Section 290 California Penal Code

APPENDIX F

§ 290.4 CALIFORNIA PENAL CODE

290.4 Compilation of Sex Offender Registration Information; Department of Justice Requirements; Sexual Predator Information Account

(A)()1) The Department of Justice shall continually compile information as described n paragraph (2) regarding any person required to register under Section 290 for a conviction of . . . . Section 288 . . . provided that offense is a felony . . . or the attempted commission of any of these offenses . . . . This requirement shall not be applied to a person whose duty to register has been terminated pursuant to paragraph (5) of subdivision (d) of Section 290, or to a person who has been relieved of his or duty to register under Section 290.5.

(2) The information shall be categorized by community of residence and ZIP Code. The information shall include the names and known aliases of the person, photograph, a physical description, gender, race, date of birth, the criminal history, and the address, including ZIP Code, in which the person resides, and any other information that th e Department of Justice deems relevant, not including information that would identify the victim.

(3) The department shall operate a "900" telephone number that member of the public may call and inquire whether a named individual is listed among those described in this subdivision. The caller shall furnish his or her first name, middle initial, and last name. The department shall ascertain whether a named person reasonably appears to be a person so listed and provide the caller with the information described in paragraph (2), except the department shall not disclose the name or address of a listed person's employer, or the street address or criminal history of a person listed, except to disclose the ZIP Code area in which the persons resides and to described the specific crimes for which the registrant was required to register. . . . .

(4)(A) On or before July 1, 1997i, the department shall provide a CD-ROM or other electronic medium containing the information described in paragraph (2), except the name or address of a listed person's employer, or the listed person's street address and criminal

history other than the specific crimes for which the person was required to register, for all persons described in paragraph (1) of subdivision (a) and shall update and distribute the CD-ROM or other electronic medium on a monthly basis to the sheriff's department in each county, municipal police departments of cities with a population of more than 200,000, and each law enforcement agency listed in subparagraph (1) of subdivision (n) of Section 290.

. . .

. . . . . .

(f) This section shall not be deemed to authorized the publication, distribution or disclosure of the address of any person about whom the information can be published , distributed or disclosed pursuant to this section.

(g) Community notification s ll be governed by subdivision (m) and (n) of Section 290.

Section 290.5 California Pen l Code